IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6842 OF 2006

Mr.Raju Shetty ..Petitioner

V/s.

Maqsood Zahoorkhan alias Johar Khan & ors ..Respondents

Mr.Vinay Hegde for the petitioner
Mr.Anoop Sharma i/b. S.M.Kazi for the respondent No.5

CORAM : S.C.DHARMADHIKARI, J.

DATE : 15TH JUNE, 2007

P.C.

1. Mr.Vinay Hegde for the petitioner submits that earlier the petitioner had filed an Appeal from Order to challenge the impugned order. However, that Appeal from Order after admission and grant of interim relief was found to be not maintainable and i.e.how permission was granted to withdraw the same with liberty to file appropriate proceedings. In these circumstances, the present petition under Article 227 of the Constitution of India has been filed by the petitioner.

2. Mr.Vinay Hegde states that the impugned order dated 7th February, 2001 is delivered on Notice of Motion No.5700 of 2000 which is dated 22th November, 2000 and Chamber Summons No.1543 of 2000 which is of the same date.

3. The suit was dismissed for default of appearance of the advocate on 31st August, 1982. The same has been restored after 18 long years and without any sufficient cause being demonstrated for non-appearance is the main grievance of Shri.Hegde.

4. The second submission is that the suit was restored at the instance of the applicants who were neither parties to the same nor were impleaded as such when the order of the dismissal in default was sought to be recalled. In such circumstances, the Notice of Motion at their instance invoking the powers of the Court below under O.9, R.4 of the C.P.C. was not maintainable.

5. On the other hand, the learned advocate appearing for the respondents/original applicants

submits that the order is composite in nature and is passed on Chamber Summons. Thus, the learned Judge has allowed the Chamber Summons first thereby impleading heirs and legal representatives of the deceased plaintiff and thereafter, considering the cause which was found to be sufficient in nature, ordered restoration of the suit. In such circumstances, merely because the restoration is after 18 years, does not warrant any interference in the discretionary powers exercised by the Court below. The discretionary power is exercised reasonably and properly. The order is otherwise just, fair and proper. Consequently, the petition deserves to be dismissed.

6. With the assistance of the learned counsel appearing for both sides I have perused the petition and annexures thereto. Notice of Motion No.5700 of 2000 and Chamber Summons No.1543 of 2000 are taken out on the same date. They are decided by a common order by the learned Judge. In Notice of Motion No.5700 of 2000, in an affidavit in support thereof, the applicant pointed out that the

advocate appearing for his father had informed him that as soon as the suit is taken up for hearing or is listed for any order, he would intimate the date thereof. What was highlighted before me and the Court below is the practice prevailing in the City Civil Court, Mumbai. After the suit is instituted and the same was registered and interim applications are either not taken out or disposed off, the matter is transferred to the Record Section and papers & proceedings lie there for years together. The parties or their Advocate have no idea as to when the suits would be listed. There is no listing periodically. The listing is done Courtwise but not as per date of institution. That is how the learned Judge adopted a justice oriented approach and observed that the parties have no control over the matter. If their advocate was not diligent they should not be punished. Paragraph 5 of the impugned order reads as under :-

> “Perusal of the record indicates that the plaintiff's advocate was regularly appearing till 14.12.1976. His presence is shown by the roznama on almost all the dates on which the matter appeared

till then. On 14.12.1976 the Notice of Motion was disposed of. Amendment was allowed. Service of the amended plaint was waived by the defendants advocate and no further date in the matter was given. Obviously as was the practice during that time the R&P must have been sent to the Record Department. Thereafter the matter appeared on the board for the firsttime on 05.08.1982 before H.H.J.Shri. Rego. It was recorded in the roznama that the parties and advocates were absent, the suit was then adjourned for dismissal on 31.08.1982. On 31.08.1982 it was recorded that the parties and advocates were absent and the suit was dismissed for default. This record itself shows that after 14.12.1976 for the first time the suit appeared on 05.08.1982 and obviously till then the R & P were in the record department. When the R & P is lying in the record department, ultimately when the suits are placed for hearing only then they appeared on board. Till then, there is no date given and the parties and their advocates are therefore not required to attend the matter. Ultimately when the suit is subsequently assigned for hearing to some Court, boards are prepared on which names of the advocates are mentioned. Normally the advocates are supposed to watch the board and keep track of the matter. They are supposed to appear as soon as the matter is placed for hearing after being kept in the record department. Under the circumstances, it is not possible for the parties to keep watching the board on which their names are

> not printed. The responsibility is solely of the advocate. If the advocate is negligent he cannot notice that the suit is placed for hearing and consequently the parties could also not come to know about it. In the present case, it is clear that this happened not only in respect of the plaintiff but also in respect of the defendants. That is because none of the parties and their advocates were present on both the dates mentioned above. It is therefore difficult to see how the original plaintiff No.1 could be blamed for absence of the advocate. He could not have attended the matter because he obviously would not know the date of hearing. The negligence if any therefore is on the part of the advocate on record and not the plaintiff No.1.For the dismissal of the suit therefore on 31.08.1982 it is not possible to hold that the plaintiff No.1 responsible. He need not suffer for the negligence of the advocate."

7. In the decision reported in **Mithailal Dalsangar Singh and others v. Annabai Devram Kini and others, AIR 2003 SC 4124** the Hon'ble Supreme Court observers thus :-

> "Inasmuch as the abatement result in denial of hearing on the merit of the case, the provision of abatement has to be construed

strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The Courts have to adopt a justice oriented approach dictated by the upper most consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (1) of Rule (9) of Order 22 and of Section 5 of the Indian Limitation Act 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial Judge found sufficient cause for condonation of delay in moving the application and such finding have been reasonably arrived at and based on the material available, was not open for interference by the Division Bench.In fact the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representative of the deceased plaintiff for setting aside of the abatement in its entirety,the suit could not have been revived. In our opinion, such

> an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the Court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once, the prayer made by the legal respresentatives of the deceased plaintiff or setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the Court passed in that behalf."

These are the guiding principles for deciding such applications. The Term "Sufficient Cause" has to be liberally construed so as to furnish opportunity to parties to have their cases adjudicated on merits. A justice oriented approach is necessary. Parties ordinarily should have an opportunity of their cases decided on merits. The impugned order

is passed on the touch-stone of these principles.

8. In the above circumstances, I am of the view that the order passed does not warrant any interference under Article 227 of the Constitution of India. The cause that was made out for non-appearance of the parties and their advocate on the relevant date has been found to be sufficient, satisfactory and trustworthy. The learned Judge has perused the record including the roznama. His discretion is therefore, not such as can be termed as arbitrary or capricious in the peculiar facts of this case.

9. Equally, when the order is composite and both applications have been decided together there is no merit in the submissions of Mr.Vinay Hegde that the application filed by the applicants-heirs for the restoration of the suit, which was dismissed during life time of the deceased, was not maintainable. Upon their application for Impleadment and request for setting aside order of Dismissal of the suit being considered together and

composite order being passed, in the peculiar facts of this case, there is no necessity of deciding any wider question based upon applicability of O.9, R.4 of the C.P.C. The learned Judge took up both applications together and after finding that the applicants are indeed heirs and legal representatives of the deceased-plaintiff so also they being not negligent or callous in the matter allowed their applications. His approach does not appear to be vitiated by any error apparent or perverse so as to call for interference in the discretionary, equitable and extra ordinary jurisdiction of this Court.

10. That the delay was considerable and the learned Judge has erred in not balancing the equities is clear but that part of the order can be modified without disturbing the final direction. The learned Judge ought to have been vigilant enough and not prejudice the petitioner/original defendant who was in no fault. The matter was between the Court and the applicants but restoration of the proceedings after such long

duration warranted compensating the petitioner by direction to pay costs.

11. In the above circumstances, the Writ Petition is disposed off by modifying the order to the extent that the restoration of the suit being Short Cause Suit No.1089 of 1973 shall take effect only if the applicants to Chamber Summons No.1543 of 2000 and Notice of Motion No.5700 of 2000 pay costs quantified at Rs.5,000/- to the petitioner within a period of two weeks from today. The payment of costs is condition precedent. Upon proof of payment of costs the Civil Suit shall stand restored to the file of City Civil Court, Mumbai for disposal. If the costs as directed are paid and proof of payment produced, the learned Judge to whom the suit is assigned shall endeavour to dispose off the same as expeditiously as possible and in any event witin a period of six months from the date of production of proof as above. The parties shall co-operate in the disposal of the case. The absence of the plaintiffs or their advocate on any date shall be

construed as default in compliance of this direction and thereupon it would be open for the learned Judge to dismiss the suit without any further adjudication.

(S.C.DHARMADHIKARI, J.)